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No. 89-478

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF MARYLAND,
Petitioner,

v.

SANDRA ANN CRAIG,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF THE ILLINOIS PUBLIC DEFENDER ASSOCIATION AND ILLINOIS ATTORNEYS FOR CRIMINAL JUSTICE, AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Illinois Public Defender Association is a private, non-profit organization of public defenders whose purpose is to insure the availability of quality legal services to all persons unable to

retain counsel in criminal cases. IPDA membership is composed of full-and part-time public defenders in 102 Illinois counties.

Illinois Attorneys for Criminal Justice is a private, non-profit organization of criminal defense attorneys and others interested in the criminal justice system. IACJ membership is comprised of members of the private bar, full-and part-time public defenders, and members of the legal education community.

IPDA and IACJ are vitally interested in assuring trial procedures which, while recognizing legitimate needs to protect minor complainants in sexual abuse crimes, respect the basic interests involved in the Sixth Amendment right to confrontation. In this case, the Court will decide whether allowing a minor to testify outside the personal presence of

the accused and the trier of fact is consistent with the purposes of the Confrontation Clause. IPDA and IACJ respectfully request this Court to consider its brief on this significant public question.

SUMMARY OF ARGUMENT

The Sixth Amendment right to face-to-face confrontation includes not merely the requirement that the witness testify in the presence of the defendant, but also that the trier of fact be personally present in order to observe the witness's demeanor and interaction with other persons. Only by personal observation can the jury make the critical credibility determinations essential to the truth-seeking function of a criminal trial.

Although cases in this area have concentrated primarily on the absence of the defendant during the witness's testimony, this Court should also consider the effect on the truth-seeking process of excluding the trier of fact from the witness's personal presence. In particular, this Court should be aware that at least one state has by legislation provided for the exclusion of the jury while requiring that the defendant be personally present.

Because the right to confrontation is violated not only where the defendant is precluded from observing the witness testify, but also where the trier of fact is excluded from the witness's personal presence, the relief granted by the lower court should be affirmed.

ARGUMENT

THE RIGHT TO FACE-TO-FACE CONFRONTATION INCLUDES NOT ONLY THE DEFENDANT'S RIGHT TO BE PRESENT WITHIN THE COURTROOM, BUT ALSO THE RIGHT TO HAVE THE TRIER OF FACT PERSONALLY PRESENT.

In Coy v. Iowa, 487 U.S. ____, 101 L.Ed.2d 857, 108 S.Ct. 2798 (1988), this Court held that the Sixth Amendment Confrontation Clause guarantees not only the opportunity to conduct cross-examination of State's witnesses, but also the right to have the witness testify in the personal presence of the defendant. Under Coy, any exception to the defendant's right to be present must be based on a case-specific showing that the witness is in need of special protection. In the present case, the Court will determine whether the Confrontation Clause permits any exceptions to the defendant s right to be present, and if

so, the nature of the prosecution's burden to show a need for special protection.

In determining these issues, this Court should not overlook that face-to-face confrontation includes not only the defendant's right to be present during the witness's testimony, but also the right to have the trier of fact personally observe the demeanor of the witness and his or her interaction with the defendant and other persons.[1] As Justice Scalia observed for the Court in Coy:

> It is always more difficult to tell a lie about a person "to his face" than "behind his back". In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusion.

101 L.Ed.2d at 866. (Emphasis added.)

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[1] Although this question was not expressly involved in the case at bar, the Maryland Court of Appeals suggested in its opinion that no confrontation problem occurs when the defendant is present, even if the trier of fact is excluded. See 560 A.2d 1126, n.9.

While the right to have the jury observe the interaction of the witness with other persons has received less attention in recent years than the defendant's right to be present, that is merely because most cases have arisen under statutes which exclude the defendant from the witness's presence during the testimony. At least one state, however, specifically authorizes excluding the jury from the room where the testimony is given while requiring that the defendant be present. Section 106A-3

of the Illinois Code of Criminal Procedure provides:

> ... only the presiding judge and attorneys for the prosecution and defendant, the defendant, necessary security personnel, persons necessary to operate the recording equipment, and any person who, in the court's discretion, would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony ...
>
> Ill.Rev.Stat., 1989, Ch. 38, ¶106A-3 (the complete text ¶106A-3 is contained in the Appendix to this brief.)[2]

Allowing the jury to personally observe the witness's demeanor is essential to insuring the "integrity of the fact-finding process," the basic purpose of the Confrontation Clause. Coy, supra, 101 L.Ed.2d at 866. See also Lee v. Illinois, 476 U.S. 530, 540-541, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986). As far back as 1894, this Court noted that one objective of the Confrontation Clause is to require the witness's personal appearance, "compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237 at 242-243, 39 L.Ed. 409, 15 S.Ct. 337 (1894). In California v. Green, 399 U.S. 149, 26 L.Ed.2d 489, 90 S.Ct. 1930 (1970), this Court again held that a primary function of the Confrontation Clause is to allow the trier of fact to observe the witness's

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[2] Although only the Illinois statute mandates that the defendant be present and the jury excluded, several states give the trial judge discretion to exclude the jury while permitting the defendant to remain. See Fla.Stat.Ann. §12.54(3)(4); N.J.Stat.Ann. 2A: 84A-32.4; Utah Code Ann. §77-35-15.5(2).

demeanor and thereby assess his credibility. 399 U.S. at 158. Even the dissenters in Coy, while objecting to the notion that the Confrontation Clause includes the right to require the witness to gaze upon the defendant during the testimony, regarded the right to have the jury observe the witness to be a "central" interest of the Confrontation Clause. Coy v. Iowa, supra, Blackmun, J., dissenting op. 101 L.Ed.2d at 871-872 (Rehnquist, J., concurring).

Various commentators have noted that permitting the factfinder to observe the demeanor of the witness is essential to determining credibility. See Note, The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes, 5 Fordham L.Rev. 995, 1006 (1985) (the purpose of face-to-face confrontation is

to allow the factfinder the opportunity to observe the demeanor of the witness when making his accusation in front of the one person who knows whether he is being truthful.) Evaluating a witness's credibility is one of the most difficult tasks facing a trier of fact, and personal observations of the witness are critical:

> More important . . . than knowledge of the substance of law and the law of evidence is "the natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not lying . . . The most acute observer would never be able to catalogue the tones of voice, the passing shades of expres ion or the unconscious gestures which he had learnt to associate with falsehood; and if he did, his observations would probably be of little use to others.

Sahm, Demeanor Evidence: Elusive and Intangible Imponderables, 47 ABA Journal 580 at 581 (1961) (quoting from Stephen, The Indian Evidence

Act, With an Introduction on the Principles of Judicial Evidence, pp. 41-43.)

Furthermore, Wigmore regarded the witness's personal appearance before the jury to be a vital component of the right to confrontation:

> [T]he judge and the jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness. . . . This secondary advantage, however, does not arise from the confrontation of the opponent and the witness; it is not the consequence of those two being brought face-to-face. It is the witness' presence before the tribunal that secures the secondary advantage -- which might equally be obtained whether the opponent was or was not allowed to cross-examine.
>
> 5 Wigmore, Evidence, §1395(2), pg. 153-154 (Chadbourn rev. 1974). (Emphasis in original.)

It has been noted that the very process of televising a witness's

testimony presents serious issues regarding accuracy and fairness, such that the jury cannot make the same observations of a witness's demeanor as are possible when it is personally present. For example, the angle of the camera lens can distort appearance, and the lighting may change the witness's demeanor to the extent that in order to appear natural, the use of make-up is required. See Comment, The Criminal Videotape Trial: Serious Constitutional Questions, 55 Oregon L.Rev. 567, 574-576 (1976). In addition, events which occur off-camera, including valuable first impressions such as the witness's entrance into the courtroom and approach to the witness stand, are beyond the jury's observation. Supra, at 576-577. See also State v. Warford, 223 Neb. 368, 389 N.W.2d 575, 582 (1986) (even where use of closed circuit

testimony is permissible, the camera must be situated to allow those in the courtroom to observe all persons in the room except the cameraman).

Although the right to have the jury personally present has tended to be overlooked in the concern about the defendant's presence or absence from the proceedings, it is nonetheless a critical aspect of the right to confrontation and should be considered by this Court. Under a statute such as that utilized in Illinois, which allows persons other than counsel to be present during the testimony, the child's interaction with parents, foster parents and social workers may be critical to determining whether his testimony is believable. Where the camera shows only the witness rather than the entire room, the jury is left to speculate about the meaning of the

witness's reaction to other persons in the room. See Coy, supra, 101 L.Ed.2d at 866 (one of the primary dangers likely to be revealed by the jury's observation of the interaction between the witness and other persons is whether the child might have been "coached by a malevolent adult.") Even where the cameraman is situated so that the entire room is shown, variations such as camera angles and lighting may preclude a reliable determination of credibility.

In determining the nature of the right to confrontation under the Sixth Amendment, this Court should consider not only the effect of permitting a witness to make his or her accusations without being required to confront the accused face-to-face, but also the effect of preventing the trier of fact from making the basic observations which determine

whether the witness's testimony is credible. Because the truth-seeking function of the Confrontation Clause is undermined where a witness is permitted to testify outside the presence of the defendant or the trier of fact, this Court should affirm the relief granted by the Maryland Court of Appeals.

CONCLUSION

The Sixth Amendment right to confrontation has traditionally been interpreted as including not only the requirement that witnesses in a criminal trial testify in the presence of the accused, but also that the trier of fact be personally present to observe the demeanor of the witness and his or her interaction with the defendant and other persons. Because viewing a witness's testimony over a television monitor deprives the trier of fact of the opportunity to make the basic observations essential to determining credibility, this Court should hold that unless there is a showing that the particular witness in question is in need of special protection, his or her testimony must be given in the personal presence of not only the defendant but also the trier of

fact. Such a requirement would permit the jury to perform its duty to determine credibility and is essential to protect the interests guaranteed by the Confrontation Clause.

For the above stated reasons, this Court should affirm the relief granted below.

Respectfully submitted,

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APPENDIX

Ill.Rev.Stats., 1989, Ch. 38, ¶106A-3:

> The court may, on the motion of the attorney for any party and upon finding that it is in the best interest of the child, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the presiding judge and attorneys for the prosecution and defendant, necessary security personnel, persons necessary to operate the recording equipment, and any person who, in the court's discretion, would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the prosecuting attorney, the defense counsel or the court may question the child. The court, in its discretion, may require that persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his

testimony, but does not permit the child to see or hear them.

If the court orders the testimony of a child to be taken under this Section, the child may not be required to testify in the presence of anyone other than those who are authorized by this Act to be present when the testimony is taken.